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No. 07-155

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION, ET AL,
Respondents.

On Petition for a Writ of Certiorari
to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE GOVERNMENTAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Following the express language of § 201(f) of the Federal Power Act that absent a "specific reference" to a governmental entity, "[n]o provision" of Part II of the Act is to "apply [directly or indirectly] ... [to] the United States, a State or any political subdivision of a State," and consistent with this Court's decisions in *United States v. Public Utilities Commission*, 345 U.S. 295 (1953), and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), did the Ninth Circuit correctly rule that the Federal Energy Regulatory Commission ("FERC") was without jurisdiction either to regulate, or to order refunds against, sales of electricity at wholesale by governmental entities?

CORPORATE DISCLOSURE STATEMENT

The California Cities of Anaheim, Azusa, Banning, Burbank, Colton, Glendale, Pasadena, Palo Alto, Redding, Riverside, Santa Clara, The Metropolitan Water District of Southern California/State Water Contractors, M-S-R Public Power Agency, Modesto Irrigation District, Northern California Power Agency, Public Utility Dist. No. 2 of Grant County, Sacramento Municipal Utility District, Los Angeles Department of Water and Power, the Transmission Agency of Northern California and Turlock Irrigation District, are governmental entities and do not issue stock, so they are not subject to the corporate disclosure statement requirement of Court Rule 29.6. Arizona Electric Power Cooperative, Inc., is a nonprofit Arizona rural electric generation and transmission cooperative that has no corporate parent, and no publicly-held company has a 10% or greater ownership interest in it. The State Water Contractors is a non-profit mutual benefit corporation, representing 27 of 29 public agencies that purchase water from the California State Water Project. It issues no stock, has no corporate parent, and no publicly held company has a 10% or greater ownership interest in it.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
INTRODUCTION AND STATEMENT OF THE CASE 1
A. The Statutory Scheme 4
1. The FPA Pre-EPAct 4
2. The FPA Post-EPAct 6
B. The Decisions Below 8
ARGUMENT 10
I. Petitioner's Argument that the Ninth Circuit Ignored This Court's Precedent by Failing to Give Deference to FERC's Interpretation of the Scope of its Authority Does Not Merit Review By This Court 10
II. Petitioner's Arguments concerning FERC's Authority Under Section 309 of the FPA Do Not Merit Review 12
III. Congress's Reconsideration of the Scope of the Exclusion of Governmental Utilities From FERC Regulation in EPAct Confirms That There Are No Ongoing Issues of National Importance Warranting Review 13
A. There is No Regulatory Void Because The Bonneville Decision Reflects The Carefully Considered Scheme of Regulation Congress Chose in 1935 and Continued in 2005 13
B. Petitioner's argument that FERC regulation of public utilities may have a permissible "incidental" effect on municipal utilities also rests on a grossly distorted view of this Court's precedents 14
C. Petitioner's Claimed Policy Concerns, Even Assuming Their Validity, Were Mooted by Passage of the Energy Policy Act of 2005 16
CONCLUSION 18

TABLE OF AUTHORITIES

Cases	Page(s)
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	13
Automated Power Exchange, Inc. v. FERC, 204 F.3d 1144 (D.C. Cir. 2000)	10
Burlington Truck Lines v. United States, 371 U.S. 156 (1962)	12
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	10,11
FPC v. Conway Corp., 426 U.S. 271 (1976)	15,16
FPC v. Southern California Edison Co., 376 U.S. 205 (1964)	*i*, 4, 12
FPC v. Texaco, Inc., 417 U. S. 380 (1974)	13
Houston East & West Texas Railway Co. v. United States, 234 U.S. 342 (1914)	15
Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986)	4
Maislin Industries U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	12
National Association of Regulatory Utility Commissioners v. FERC, 475 F.3d 1277 (D.C. Cir. 2007)	4
Neal v. United States, 516 U.S. 284 (1996)	12

TABLE OF AUTHORITIES—Continued

New York v. FERC,
535 U.S. 1 (2002) 4, 5

Public Citizen v. Steed,
733 F.2d 93 (D.C. Cir. 1984) 17

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi,
474 U.S. 409 (1986) 14

Transmission Agency of Northern California v. FERC,
495 F.3d 663 (D.C. Cir. 2007)
("*TANC*") 3, 11, 16

United Distribution Cos. v. FERC,
88 F. 3d 1105 (D.C. Cir. 1996) 11

United States v. Public Utilities Commission,
345 U.S. 295 (1953) .....*i*, 4, 11, 12

Administrative Decisions

Californians for Renewable Energy, Inc. v. California Public Utilities Commission, 119 F.E.R.C. ¶ 61,058
(2007) 3

Dairyland Power Coop., 37 F.P.C. 12 (1967) 6

Mid-Continent Area Power Pool, 89 F.E.R.C.
¶ 61,135 (1999) 8

Mid-Continent Area Power Pool, 91 F.E.R.C.
¶ 61,353 (2000) 8

New West Energy Corp., 83 F.E.R.C. ¶ 61,004
(1998) 8

TABLE OF AUTHORITIES—Continued

Pacific Water & Power, Inc. v. State of California,
51 F.E.R.C. ¶ 61,080 (1990) 8

Public Service Co. of Oklahoma,
25 F.P.C. 656 (1961) 8

Sacramento Municipal Utility District v. Pacific Gas and Electric Co.,
37 F.E.R.C. ¶ 61,323 (1986) 8

San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Services into Markets Operated by the California Independent System Operator & the California Power Exchange, 94
F.E.R.C. ¶ 61,245 (2001) 8

San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Services into Markets Operated by the California Independent System Operator & the California Power Exchange,
121 F.E.R.C. ¶ 61,067 (2007), *reh'g pending* 10

Western Systems Power Pool,
55 F.E.R.C. ¶ 61,495 (1991) 8

Statutes

The Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977)

§ 402(a)(1)(B),
42 U.S.C. § 7172(a)(1)(B) 5

Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, 119 Stat. 594 (2005).....14

TABLE OF AUTHORITIES—Continued

§ 1283
(to be codified at 16 U.S.C. § 824v) 6

§ 1284
(to be codified at 16 U.S.C. § 825o-1) 7

§ 1286
(to be codified at 16 U.S.C. § 824e) ...1, 2, 18

§ 1291
(to be codified at 16 U.S.C. § 824(f)) 6

Federal Power Act

§ 201(b), 16 U.S.C. § 824(b).....5, 9

§ 201(f), 16 U.S.C. § 824(f) .....*passim*

§ 205, 16 U.S.C. § 824d 3, 5, 6, 9

§ 205(b), 16 U.S.C. § 824d(b) 16

§ 206, 16 U.S.C. § 824e .....*passim*

§ 206(a), 16 U.S.C. § 824e(a) 16

§ 206(b), 16 U.S.C. § 824e(b) 4, 9

§ 206(e) (to be codified at 16 U.S.C. § 824e(e) 1

§§ 206(e)(2) to 206(e)(4) (to be codified at 16 U.S.C. § 824e(e)(2) to (e)(4)) 2, 7

§ 222 (to be codified at 16 U.S.C. § 824v) 6

§ 309, 16 U.S.C. § 825h 6, 12, 13

Natural Gas Act

§ 16, 15 U.S.C. § 717o 13

TABLE OF AUTHORITIES—Continued

Rules

Sup. Ct. R. 29.6 ..... *ii*

Legislative History

Electricity Proposals and Electric Transmission and Reliability Enhancement Act of 2003: Hearing before the S. Comm. on Energy and Natural Resources, 108th Cong., S. Hr'g No. 108-67 (2003) 7

The Energy Policy Act of 2005: Hearings before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce, House of Representatives, 109th Cong., H.R. Ser. No. 109-1 (2005) 7

INTRODUCTION AND STATEMENT OF THE CASE

In the decision at issue here, construing the then applicable language of the Federal Power Act ("FPA"), the court of appeals held that "FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities." Pet. App. 5a. The court of appeals derived this unexceptional holding "from a straightforward analysis of the statute." *Id.* At all times relevant to the 2000-2001 time period at issue, the law was clear: Congress expressly denied FERC any power to order governmental sellers to pay refunds under FPA § 206, 16 U.S.C. § 824e. Every court that had considered the issue, including this Court, uniformly recognized that Congress had barred FERC (and its predecessor, the Federal Power Commission) from regulating governmental sales of electricity.

Following the Western electric market disorders of 2000 and 2001 that gave rise to the proceedings below, Congress changed the scope of FERC's refund authority. In §1286 of the Energy Policy Act of 2005 ("EPAct")[1] Congress added to FPA § 206 a new subsection (e) that prospectively granted FERC authority to order certain large governmental sellers of electricity to pay refunds upon making specified findings concerning such utilities' short term sales in centralized markets. Section 206(e) now subjects such non-federal governmental utilities to refunds only if they violate the centralized market tariffs or applicable Commission rules. It expressly provides that the federal power marketing

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[1] Energy Policy Act of 2005 ("EPAct"), Pub. L. 109-58, § 1286, 119 Stat. 594, 981 (2005) (to be codified at 16 U.S.C. § 824e).

agencies[2] and the Tennessee Valley Authority are not subject to FERC regulation except refund orders "to achieve a just and reasonable rate."[3] It subjects the Bonneville Power Administration to refunds only under a standard of just and reasonable rates measured by short term sales in the same geographic market in approximately the same period.[4] Both before and after the passage of EPAct, Congress carefully and specifically defined the reach of FERC's refund jurisdiction over governmental utilities.

This case provides no basis for the Court to address the state of FERC's current refund authority concerning governmental sales of electricity into centralized markets. The court of appeals's decision, and the underlying FERC decisions, involve FPA § 206 as it stood pre-EPAct, not as it stands now. While the Governmental Respondents believe that FERC's post-EPAct refund authority against governmental entities is strictly circumscribed by the newly-added language of FPA §§ 206(e)(2) to 206(e)(4), the reach and import of these provisions, and the expanded scope of FERC's refund authority, have yet to be addressed by the Commission or courts of appeal.

The decision of the court of appeals below is of continuing significance to the parties. However, as FERC itself has noted, the perfect storm of circumstances that gave rise to the California market disturbances in 2000-2001 and the resulting regulatory process that led up to the court's

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[2] The federal power marketing agencies are Bonneville Power Administration, Southeastern Power Administration, Southwestern Power Administration, and Western Power Administration.

[3] EPAct § 1286(4)(C).

[4] *Id.*

decision are not likely to be repeated.[5] FERC has instituted a number of regulatory reforms in wholesale power markets specifically designed to prevent the kind of price volatility and market collapse that occurred more than six years ago in California.[6]

Petitioner's claims of decisional conflict are meritless. In its decision, and in its order denying panel and *en banc* rehearing, the court of appeals correctly rejected Petitioner's contention that adherence to the plain meaning of FPA § 201(f) is in conflict with rulings in other circuits. The District of Columbia Circuit has recently and expressly "agree[d] with the *BPA*" decision at issue here.[7] It found no conflict between the appellate decisions Petitioner cites here and the core appellate holding below: *i.e.*, that FERC lacks general refund authority against governmental entities under §§ 205 and 206 of the FPA. Further, Petitioner now claims conflicts with some seven decisions of this Court, none of which was raised in its petition for rehearing and rehearing *en banc*.[8] Those cases, including a 1914 railroad decision under the Interstate Commerce Act, are, in any event, inapposite.

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[5] *Californians for Renewable Energy, Inc. v. Cal. Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, P 30 (2007) (delineating the multiple factors that combined "to place California and the entire West in an electricity crisis that had never before been experienced").

[6] Brief for the Federal Energy Regulatory Commission In Opposition, *Sempra Generation v. Pub. Utils. Comm'n of Cal.*, No. 06-1454 *et al.*, 14-16 (U.S. Aug. 6, 2007).

[7] *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 674 (D.C. Cir. 2007) ("*TANC*"). *See also id.* 495 F.3d at 676.

[8] California Parties' Petition for Panel Rehearing and Rehearing En Banc, *Bonneville Power Admin. v. FERC*, No. 02-70262 (9th Cir. Nov. 13, 2006).

At bottom, Petitioner's quarrel is with Congress, not the decision below. That decision correctly held that "the text and structure of the FPA are unambiguous: ... FERC's authority to order refunds under § 206(b) is specifically limited to 'public utilities' [*i.e.*, non-governmental entities] and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f)." Pet. App. 26a. The court's finding is fully consistent with the pronouncements of this Court. In *United States v. Public Utilities Commission*, 345 U.S. 295, 313 n.23 (1953), this Court held that "the exclusion of producing municipalities from Commission jurisdiction was intended." In *FPC v. Southern California Edison Co.*, 376 U.S. 205, 219 n.10 (1964), the Court similarly stated that "Section 201(f) of the Federal Power Act exempts the [Interior] Secretary's sale of energy from FPC jurisdiction."

None of the Rule 10 considerations warranting *certiorari* is present here, and the petition should be denied.

A. The Statutory Scheme

1. The FPA Pre-EPAct

FERC is a "creature of statute" and has "*only* those authorities conferred upon it by Congress." *Nat'l Ass'n of Regulatory Util. Commr's v. FERC*, 475 F.3d 1277, 1286 (D.C. Cir. 2007) (Sentelle, C.J. dissenting). *See also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it"). FERC derives its authority from the FPA.

This case involves claims for refunds under § 206 of the FPA, which is contained in Part II of the Act. Congress enacted Part II of the FPA in 1935. *New York v. FERC*, 535 U.S. 1, 6 n.3 (2002). Under Part II Congress granted the Commission "jurisdiction [over] 'the transmission of electric

energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *Id.* at 6-7 (quoting FPA § 201(b), 16 U.S.C. § 824(b)).[9] But as to governmental sellers of electricity, FPA § 201(f), 16 U.S.C. § 824(f), provided, that, absent a "specific reference" to a governmental entity, "[n]o provision" of Part II of the Act is to "apply to, or be deemed to include" governmental entities "directly or indirectly" or "any officer, agent, [or] employee" of a governmental entity acting in his or her official capacity.

The pre-EPAct text of § 201(f), which prohibited FERC during the period at issue from ordering refunds against governmental entities states:

> (f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt
>
> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, ... or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, *unless such provision makes specific reference thereto.*

Pet. App. 15a (quoting statute and adding emphasis).

FERC "derives its refund authority from subchapter [Part] II of the FPA," and in particular §§ 205 and 206, *i.e.*,

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[9] In § 402(a)(1)(B) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 583 (1977) (codified at 42 U.S.C. § 7172(a)(1)(B)), the functions of the former Federal Power Commission under Part II of the FPA were transferred to the FERC.

16 U.S.C. §§ 824d & 824e. Pet. App. 14a. Sections 205 and 206 empower FERC to regulate the wholesale and interstate transmission rates of "any public utility," but as Petitioner notes, the "definition of 'public utility' does not include municipalities and other governmental entities." Pet. 5. Petitioner acknowledges that the statutory "[§ 201(f)] exemption," "obviously means that when a municipality makes a bilateral sale of electrical power to a buyer, FERC does not regulate the price." Pet. 6.

Petitioner's multiple references to FPA § 309 are inapt. Pet. 5, 7, 19, 22 & 29. That section is not mentioned in the decision of the court of appeals nor is that the basis of the FERC orders, and in any event, is no more than a limited ancillary grant of authority to enforce substantive provisions in Part II when they are specifically applicable.

2. The FPA Post-EPAct

The regulatory framework that prevails under the FPA today is different from that which prevailed in 2000-2001. Well after the refund orders that are the subject of the court of appeals decision at issue here, Congress took up the issue of FPA reform. Congress amended § 201(f) to codify, expressly, FERC's long-standing doctrine excluding most rural electric cooperative utilities from its public utility jurisdiction.[10] Congress also enacted new FPA § 222[11] making it "unlawful for any entity (including an entity described in section 201(f))" to engage thereafter in electric

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[10] EPAct § 1291 (to be codified at 16 U.S.C. § 824(f)) (No provision in this Subchapter shall apply to "an electric cooperative that receives financing under the Rural Electrification Act of 1936 ... or that sells less than 4,000,000 megawatt hours of electricity per year"). *See* Pet. App. 20a (discussing *Dairyland Power Coop.*, 37 F.P.C. 12 (1967)).

[11] EPAct § 1283 (to be codified at 16 U.S.C. § 824v).

energy market manipulation and expanded FERC's civil penalty authority for intentional violations of Part II of the FPA.[12]

In the development of EPAct, Congress also considered and rejected proposals to expand FERC's refund authority to cover all sales into centralized markets. The CEO of Southern Company, for example, urged Congress that "sound public policy to protect consumers would mean putting all utilities participating in interstate wholesale electricity markets under FERC's full 'just and reasonable' requirements."[13] The President of the Edison Electric Institute also argued that "retail electricity consumers would be much better protected by making all electricity suppliers, not just shareholder-owned utilities, subject to FERC refund authority."[14] Congress struck a different balance. As Petitioner itself explains, Congress:

> amended FPA Section 206 to add new section 206(e)(2)-206(e)(4) allowing FERC to order refunds from certain very large municipalities in certain limited circumstances: short-term sales through centralized markets by those few municipalities that sell 8,000,000 megawatt hours or more of electricity per year, where

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[12] EPAct § 1284 (to be codified at 16 U.S.C. § 825o-1).

[13] *Electricity Proposals and Electric Transmission and Reliability Enhancement Act of 2003. Hearing before the S. Comm. on Energy and Natural Resources*, 108th Cong. 78, S. Hr'g No. 108-67 (2003) (statement of H. Allen Franklin, Chairman, President & CEO, Southern Company).

[14] The *Energy Policy Act of 2005: Hearings before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, House of Representatives, 109th Cong. 135, H.R. Ser. 109-1 (2005) (statement of Thomas Kuhn, President, Edison Electric Institute).

the sale violates the terms of the applicable tariff.

Pet. 29-30.

B. The Decisions Below

In proceedings on a complaint under FPA § 206, on March 9, 2001, FERC ordered public utility sellers to make refunds for certain sales in the California centralized markets. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Services into Markets Operated by the Cal. Ind. Sys. Op. & the Cal. Power Exchange*, 94 F.E.R.C. ¶ 61,245 (2001). FERC also held in that order that it "ha[d] no authority to order [governmental] sellers to make refunds." *Id.* at 61,864.

On July 25, 2001, FERC reversed itself and held, for the first time in its history and contrary to its uniform prior pronouncements,[15] that Congress had granted it authority to

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[15] *See, e.g., Pub. Serv. Co. of Okla.*, 25 F.P.C. 656, 658 (1961) ("instrumentality of the State of Oklahoma ... is not subject to the rate regulatory jurisdiction of this Commission"); *Sacramento Municipal Utility Dist. v. Pacific Gas and Elec. Co.*, 37 F.E.R.C. ¶ 61,323, at 61,942 (1986) ("section 201(f) exempts SMUD's rates from Commission regulation"); *Pacific Water & Power, Inc. v. State of California*, 51 F.E.R.C. ¶ 61,080, at 61,180 (1990) ("instrumentalities of California ... are exempt from our rate jurisdiction under sections 205 and 206 of the Federal Power Act"); *Western Sys. Power Pool*, 55 F.E.R.C. ¶ 61,495, at 62,713 (1991) ("we cannot assert jurisdiction over nonpublic utility members" of the power pool); *New West Energy Corp.*, 83 F.E.R.C. ¶ 61,004, at 61,018 (1998) ("Congress was deliberate and careful in its efforts not to impose FPA public utility regulation on states and municipalities"); *Mid-Continent Area Power Pool*, 89 F.E.R.C. ¶ 61,135, at 61,387 (1999) (refund order does not apply to state operated utility); *Mid-Continent Area Power Pool*, 91 F.E.R.C. ¶ 61,353, at 62,182 (2000)

order refunds from "non-public utility" sellers. Pet. App. 60a. According to the Commission, such refund authority derived from the transaction, not the identity of the sellers: "Commission jurisdiction attaches to ... wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse." Pet. App. 63a. It reaffirmed this position in its order denying rehearing. Pet. App. 117a-118a.

On review, the court of appeals rejected FERC's transactional analysis.

> FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC's authority over governmental entities, *see* § 201(f), and limit FERC's authority to ensure just and reasonable rates and to order refunds to 'public utilities,' *see* §§ 205, 206(b).

Pet. App. 26a (original emphasis). The court of appeals denied rehearing and rehearing *en banc* in a substantive order and explicitly rejected Petitioner's claim of a conflict with decisions of the District of Columbia Circuit.[16]

In a remand order issued October 19, 2007, FERC implemented the decision of the court of appeals in this case

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("[FERC] cannot enforce the refund requirement against Nebraska District").

[16] The District of Columbia Circuit "did not say, or even imply, that FERC may assert jurisdiction over a non-jurisdictional entity for purposes of ordering a refund." Pet. App. 43a.

and vacated its "refund orders to the extent that they subject non-public utility entities to the Commission's FPA section 206 refund authority." *San Diego Gas & Electric Co. v. Sellers of Energy & Ancillary Services Into Markets Operated by the California Independent System Operator & the California Power Exchange*, 121 F.E.R.C. ¶ 61,067, P 2 (2007), *reh'g pending*.

ARGUMENT

I. Petitioner's Argument that the Ninth Circuit Ignored This Court's Precedent by Failing to Give Deference to FERC's Interpretation of the Scope of its Authority Does Not Merit Review By This Court.

Without claiming any ambiguity in the statute, and incredibly, without even citing *Chevron*,[17] Petitioner argues that the Ninth Circuit ignored this Court's precedent in failing to give FERC deference in interpreting the scope of its authority. Pet. 23.[18] *Chevron* establishes the familiar two-pronged test for determining when deference is due to an agency's interpretation of the statutes it administers. Under the first, the court ascertains whether the statute is unambiguous. *Chevron*, 467 U.S. at 842-43. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

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[17] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[18] The only case cited by Petitioner suggesting a statutory ambiguity, *Automated Power Exch., Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000), addressed the question of whether an independent power exchange, a type of entity not in existence in 1935 at the time Part II of the FPA was enacted, could be regulated as a public utility. Pet. 24, *citing* 204 F.3d at 1150. Municipal utilities did exist in 1935 and have always been recognized as not being public utilities within the meaning of the FPA.

expressed intent of Congress." *Id.* It is only in cases of statutory ambiguity that questions of agency deference arise.

This was precisely the analysis performed by the Ninth Circuit. Pet. App. 13a-28a. Construing § 201(f) of the Act, which expressly excludes federal and state governmental utilities from FERC's rate jurisdiction, together with §§ 205 and 206, which limit FERC's rate jurisdiction solely to "public utilities" – a universe from which governmental utilities are also expressly excluded – the Ninth Circuit found that the "text is clear and unambiguous." Pet. App. 5a. "We conclude," it stated, "that FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities." *Id.* The District of Columbia Circuit reached an identical conclusion in July. *TANC*, 495 F.3d at 674.[19]

This Court has reached the very same conclusion. "[T]he exclusion of producing municipalities from Commission jurisdiction was intended." *Public Util. Comm'n*, 345 U.S. at 313 n.23.[20] "Section 201(f) of the [FPA] exempts the

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[19] Petitioner had earlier argued to this Court in its May 17, 2007, motion for extension of time to file a petition for writ of certiorari that the District of Columbia Circuit's precedent was in direct conflict with the Ninth Circuit's opinion. Motion at 4. But as it concedes in its petition, the District of Columbia Circuit's opinion in *TANC* directly rejects that argument. Pet. 21-22. Curiously, Petitioner then cites the District of Columbia Circuit's ruling in *United Distribution Cos. v. FERC*, 88 F. 3d 1105 (D.C. Cir. 1996) in support of its petition (Pet. 23), even though the *TANC* opinion directly rejects the relevance of that case. *TANC*, 495 F.3d at 675 n.9.

[20] *Public Utilities Commission* also held that sales of electricity at wholesale to municipalities from jurisdictional public utilities were subject to the full scheme of regulation and remedies in Part II of the FPA. *Public Utilities Comm'n*, 345 U.S. at 312-16.

[Interior] Secretary's sale of energy from FPC jurisdiction." *Southern California Edison Co.*, 376 U.S. at 219 n.10. The Court's interpretations of the FPA in *Public Utilities Commission* and *Southern California Edison* render *Chevron* deference inapplicable to FERC's revisionist attempt to assert refund authority over governmental entities. As the Court stated in *Neal v. United States*, 516 U.S. 284, 295 (1996):

> In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.

See also Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) (same).

II. Petitioner's Arguments concerning FERC's Authority Under Section 309 of the FPA Do Not Merit Review.

Petitioner seeks to evade the § 201(f) exclusion by stating that it applies only to Part II of the FPA, whereas § 309, which "giv[es] FERC authority to perform such acts and make such orders as necessary to carry out the Act is in Part III of the FPA ... and is therefore not subject to the Section 201(f) exclusion." Pet. 7. FERC's order cannot be upheld on a statutory basis the agency did not assert. *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). FERC's orders below did not assert that Section 309 gave it ancillary authority to regulate entities excluded from its jurisdiction under Part II.

In any event, Petitioner's argument is meritless. The FPA and the Natural Gas Act ("NGA") are construed *in pari materia*. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). It has long been settled that the limited powers accorded FERC under § 16 of the Natural Gas Act (the companion provision to § 309 of the FPA) do not enable the Commission to "set at naught an explicit provision of the Act." *FPC v. Texaco, Inc.*, 417 U. S. 380, 394 (1974).

III. Congress's Reconsideration of the Scope of the Exclusion of Governmental Utilities From FERC Regulation in EPAct Confirms That There Are No Ongoing Issues of National Importance Warranting Review.

A. There is No Regulatory Void Because The Bonneville Decision Reflects The Carefully Considered Scheme of Regulation Congress Chose in 1935 and Continued in 2005.

Petitioner claims that, "by barring FERC from enforcing its refund orders against all sellers in those markets, including municipalities, the Court of Appeals has created a regulatory void where FERC has found rates to be unjust and unreasonable, but cannot require a remedy." Pet. 15. There is no regulatory void. The history of FPA § 201(f) shows that Congress expected governmental utilities to be self regulating,[21] while "public utilities" were to be subject to the Commission's jurisdiction. Congress reconfirmed that approach in 2005 except to the limited extent that it specifically provided for FERC regulation of the rates of certain larger government utilities under specified circumstances.

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[21] *See* Pet. App. 27a-28a; Pet. App. 28a n.9 (discussing legislative history).

The "regulatory void" that petitioner accuses the lower court of creating is not a void at all, but a deliberate Congressional choice as to the appropriate scope of the Commission's regulatory authority. Congress's decision to limit the scope of regulations must be respected as much as its decision to expand it. *Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409 (1986) (state could not reregulate natural gas prices Congress had deregulated). Even in the orders reversed by the Ninth Circuit below, FERC disclaimed any authority to regulate bilateral sales by municipal utilities, a substantial portion in itself of the wholesale market. Directly at odds with its regulatory gap argument, Petitioner concedes and accepts that the § 201(f) exemption "obviously means that when a municipality makes a bilateral sale of electrical power to a buyer, FERC does not regulate the price." Pet. 6.

FERC remains fully empowered to ensure that the rates Congress empowered it to regulate – the rates of public utilities – are just and reasonable. Except for the specific provisions added to Part II by EPAct, FERC does not have the authority to regulate the sales at wholesale of governmental utilities.

B. Petitioner's argument that FERC regulation of public utilities may have a permissible "incidental" effect on municipal utilities also rests on a grossly distorted view of this Court's precedents.

Petitioner maintains that the Ninth Circuit's opinion conflicts with this Court's precedents approving agency actions that may incidentally affect matters outside their jurisdiction "to ensure that rates within [FERC's] jurisdiction are just and reasonable." Pet. 15. But this case does not involve incidental effects on nonjurisdictional entities.

"FERC *specifically ordered governmental entities/non-public utilities to pay refunds*, an action that lies outside Congress's clearly expressed intent that FERC's § 206 refund authority should apply only to public utilities." Pet. App. 26a (emphasis added).

Petitioner misreads this Court's decision in *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914) for the proposition that an agency charged with prohibiting discriminatory rates in interstate commerce could regulate intrastate rates – otherwise outside its jurisdiction – to remedy the discrimination. Pet. 17. Erroneously labeling the exemption of intrastate rates from the jurisdiction of the Interstate Commerce Commission as a "precursor" to § 201(f), Petitioner argues that "the proviso limited the agency's authority to fix intrastate rates in isolation, but this proviso had to yield where necessary to fulfill the agency's mission to ensure the lawfulness of rates within its jurisdiction." Pet. 18. That is a mischaracterization of the case. In *Houston East & West*, the Court makes clear that the ICC order in question had not altered in any way the rate set for intrastate traffic, but had directed instead that the interstate rate be set at the same level as the intrastate rate. 243 U.S. at 347.

Houston East & West was a precursor to the decision in another case cited by Petitioner, *FPC v. Conway Corp.*, 426 U.S. 271, 276-82 (1976). Pet. 20. *Conway* makes clear that the Commission cannot exceed the regulatory limits of the FPA by regulating exempt intrastate sales even where that would be helpful in eliminating discrimination with respect to FPA jurisdictional rates. While the Commission had a duty to consider the relationship between retail and wholesale rates in determining whether the wholesale rates were discriminatory, the Commission's power was limited to adjusting the wholesale rates of jurisdictional utilities

because it lacked any authority to regulate intrastate retail electricity charges:

> The prohibition against discriminatory or preferential rates or services imposed by § 205(b) and the Commission's power to set just and reasonable rates under § 206(a) are accordingly limited to sales "subject to the jurisdiction of the Commission," that is, to sales of electric energy at wholesale. The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates.

426 U.S. at 276-77.

Here, what the Ninth Circuit found unlawful was not the incidental effect of the agency's decision regulating the rates of public utilities, but its express directive that exempt utilities be subject to refund liability. Pet. App. 26a. There is nothing remotely incidental about the impact of the FERC's orders on exempt entities. The District of Columbia Circuit has recently reached an identical conclusion. *TANC*, 495 F.3d at 674-76.

C. Petitioner's Claimed Policy Concerns, Even Assuming Their Validity, Were Mooted by Passage of the Energy Policy Act of 2005.

Petitioner states that the decision below is *not* about FERC jurisdiction over bilateral sales by governmental utilities, and it concedes that FERC cannot regulate such sales. Pet. 6. Rather, it says, the import of this case is the

"Court of Appeals's failure to credit FERC's explanation of how refund orders work in these new-fangled centralized markets." Pet. 25.

Petitioner acknowledges, however, that EPAct specifically addressed the issue of governmental sales into centralized markets, and "amended FPA Section 206 to ... allow[] FERC to order refunds from certain very large municipalities [concerning]: short-term sales through centralized markets." Pet. 29. Straining to find some remaining life for its centralized market argument post-EPAct, Petitioner argues that the EPAct amendment "says nothing at all about how to treat the sales" by smaller municipal utilities. *Id.* at 30.

In other words, Petitioner's position is that pre-EPAct the FPA: i) barred FERC from ordering refunds with respect to all wholesale municipal sales made bilaterally; but ii) authorized FERC to order refunds with respect to all wholesale municipal sales made into centralized markets. Thus, in Alice in Wonderland fashion, Petitioner does not read EPAct § 1286 as a new source of FERC refund authority, but instead as creating an exception that cuts back on and limits the scope of FERC's prior refund authority against all governmental utility sales into centralized markets.

This argument is "as silly as it sounds." *Pub. Citizen v. Steed*, 733 F.2d 93, 102 (D.C. Cir. 1984). EPAct ratifies the historic exemption of municipal utilities from rate regulation and carves out only a limited exception to the refund exemption. Indeed, EPAct amends § 201(f), not to limit the types of entities entitled to the exemption, but to bring rural electric cooperatives (who had been exempted as a result of administrative action by the agency) expressly *within* the statutory exemption. The import of EPAct is plain. Had

Congress intended to give FERC refund authority over all governmental utility sales into centralized markets it would have done so. Instead, it created a new and limited exception to the recognized exemption with respect to certain large municipal sales. Congress otherwise affirmatively chose to retain the broad and general refund exemption grounded in FPA §§ 201(f) and 206. Thus, now as before, the FPA provides FERC no general refund authority with respect to sales by governmental utilities of electricity at wholesale. Congress's 2005 amendment of § 206, giving FERC limited prospective refund authority with respect to a narrow category of governmental sales, only serves to confirm the Ninth Circuit's holding that prior to EPAct, FERC had no authority whatsoever to order refunds against governmental utilities. Pet. App. at 28a-29a n.10 ("the adoption of [EPAct § 1286] comports with our interpretation of the FPA.").

CONCLUSION

For all of the foregoing reasons the petition should be denied.

Respectfully submitted,

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